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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1466

BOSTON HOME AND SCHOOL ASSOCIATION,
PETITIONER,

v.

TALLULAH MORGAN, et al.,
JOHN J. KERRIGAN, et al.,
RESPONDENTS.

REPLY BRIEF OF THE PETITIONER, BOSTON HOME AND SCHOOL ASSOCIATION, TO RESPONDENTS' BRIEFS IN OPPOSITION

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I

At page 5 of the Brief of Plaintiffs, Tallululah Morgan, et al. (hereinafter "Plaintiffs") in Opposition to the Boston Home and School Association's Petition, plaintiffs argue that "the factual premises of the Association's theory" (i.e. that the racial imbalance found in a substantial number of Boston public schools was the result of causes other than illegal School Committee action)

"were rejected in this case at the violation stage", so that the Association's evidence offered at the remedy stage was properly rejected. But the question of the effect of School Committee action on those particular schools was not even raised at the liability trial. If "the factual premises of the Association's theory" were rejected, this was done by a retroactive application of the *Keyes* presumption after the close of trial, without fair opportunity to litigate the rejected "factual premises".

Nor is it true, as contended by plaintiffs (page 3) and by the Massachusetts Board of Education (hereinafter the "State Board") (pp. 4-5) that either lower court found the issue of the effect of School Committee action on the racial imbalance in particular schools to "have been litigated once at the liability stage" (page 3) or that the issue of the inclusion of particular schools within the scope of the Court's remedial decree had previously been "tried" (page 8). Indeed, the District Court described the issue raised by the Association's theory and evidence as "somewhat novel". (Record Appendix II, 166). The general findings of the District Court referred to at page 4 of the State Board's Brief regarding the School Department's failure to adhere to a neighborhood school system (extensive busing, open enrollment, multi-school districts, magnet schools, city-wide schools and feeder patterns) related exclusively to the high schools, middle schools, and particular elementary schools which would have been desegregated under the Association's remedy. There is nothing in the record to indicate that *any* of the above exceptions to the neighborhood school system affected any of the approximately 100 elementary schools involved in the Association's particularized offer of proof, and the Association's proof would have shown the contrary. (Record Appendix II, 206). Similarly, the Association's remedy would have desegregated the schools which were

constructed at "locations designed to preserve existing patterns of residential neighborhoods". (State Board's Brief, page 11). The *only* evidence in the record regarding the effect of residential segregation on racial imbalance in the schools at the liability trial was offered *by plaintiffs*, and for the purpose of proving that, as a general proposition, all of the racial imbalance in the schools could not be attributed to causes other than racial discrimination. Record Appendix II, 1-62; see the State Board's Brief, p. 13. We have no quarrel with that evidence, or with the District Court's rejection of the School Committee's attempt to use that evidence as a complete defense to liability, by arguing that it showed that *all* racial imbalance in all of the schools was attributable entirely to residential segregation. See the State Board's Brief, p. 4. *No* evidence (other than that which the Association sought unsuccessfully to introduce — Record Appendix II, 170-210) is to be found in the record as to what, if any, effect School Committee action had on the racial imbalance in the approximately one hundred particular elementary schools involved in the Association's particularized offer of proof — an issue which was simply not litigated.

The lower courts did find that this issue *might* have been litigated, had School Committee counsel been clairvoyant before *Keyes*, or had such counsel successfully sought to reopen the liability trial after *Keyes* for that purpose. However, it is unclear why the School Committee should have sought to do this in view of the District Court's express separation of the trial between liability and remedy, and it is, at best, unclear that any such motion could have been successful.[1] Indeed, the contrary is indicated by the fact that the motion of the school committee referred to on page 5 of the State Board's Brief, which it

[1] The plaintiffs argued in their Brief to the Court of Appeals that such a motion should, in any case, have been denied.

describes as a motion "to reopen and present new evidence in light of *Keyes*", was *denied* by the District Court on March 18, 1974. And, while it is true that a considerable time elapsed between the decision of this Court in *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973) and the District Court's decision on liability (June, 1974), plaintiffs fail to point out that the Equal Educational Opportunities Act of 1974 was not enacted until August 21, 1974, over two months *after* the District Court's liability decision was handed down.

The fact is that by rejecting the Association's evidence proferred at the subsequent hearings on remedy, the District Court refused to even consider the only evidence offered the Court which would have permitted the fashioning of the particularized remedy permitted by *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189, (1973), and mandated by the Equal Educational Opportunities Act of 1974.

II

Plaintiffs further contend that the Association's desegregation plan (which was summarily rejected by the District Court) "would have left massive segregation in the Boston public schools" (page 3). The State Board makes a similar contention (pp. 5-6). However, this argument, like the contention that the Association's theory "would lead to massive remaining, court enforced, segregation" (Plaintiffs' Brief, p. 9; see State Board's Brief, pp. 11-12), begs the question by assuming that the segregation which must be judicially eliminated is *all racial imbalance* which exists in the schools, whatever its cause, rather than that resulting from illegal School Committee action. The fact that this Court's decisions in *Green* v. *County School Board,* 391 U.S. 430 (1968)

and *Davis* v. *Board of School Commissioners,* 402 U.S. 33 (1971) have been so misinterpreted in spite of the clear disclaimer of any such intended result in *Swann,* in *Wright* v. *Council of the City of Emporia,* 407 U.S. 451 (1972) and in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), has led, in Boston as elsewhere,[2] to sweeping remedial orders which are not commensurate with any realistic assessment of the scope of the constitutional wrong.

III

Plaintiffs and the State Board further argue that consideration of the merits of the Association's position should be precluded because it seeks to violate the terms under which the Association was permitted to intervene, i.e. that the Association would not relitigate previously litigated issues. But the Association sought only to litigate an issue (the effects of School Committee action on the racial composition of a large number of particular schools) as to which the Court had heard *no* evidence. Nor do even the District Court's sweeping general findings resulting from retroactive application of the *Keyes* presumption contradict the Association's contention that the racial composition of many schools did not result from illegal state action. We do not dispute the District Court's findings that, in some manner, the violation affected every school. Indeed, the Court's findings on discriminatory teacher assignments alone make this clear. From this it should not automatically follow that the remedy must require the racial balancing of every school. In addition, neither the District Court nor Court of Appeals strictly construed the terms of the intervention so as to preclude

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[2] Chief Justice Burger found "disturbing" this common misreading of *Swann* which interprets the duty to "desegregate" schools as being the equivalent of a duty to "racially balance" schools, in *Winston-Salem/Forsyth County Board of Education* v. *Scott,* 404 U.S. 1221 (1971) at 1227.

full consideration on the merits of the Association's legal argument.[3]

IV

Plaintiffs assert (page 4) that in Boston there are no practical difficulties to prevent complete desegregation (by which they mean all-out racial balancing). By "practicalities", plaintiffs refer only to the physical logistics and completely ignore the devastating practical obstacles of heightened racial animosity and violence,[4] massive loss of middle class students from the system and disruption and the virtual collapse of education in many schools, which have resulted from involuntary assignment of thousands of elementary students far from their neighborhoods. The "practicality" that this judicial policy strikes the average citizen as (1) unjust, (2) unnecessary and (3) a totally unacceptable intrusion into his or her private life, is dismissed as legally irrelevant or "not constitutionally recognized". (Appendix to the Association's Petition, A-37). In the same way, plaintiffs (p. 11) and the State Board (p. 12) speculate that permitting the continuation of imbalanced schools might have an adverse effect on the "hearts and minds" of students, (page 11), but ignore the immeasurable psychological trauma which the present remedy entails.

V

Nor is the repeated mischaracterization of the Association's theory as an attempt to "fractionalize" or "fractionate" segregation within each particular school (Plaintiffs' Brief, pages 5, 9 and 11) a fair description of the Association's position. The Association does not seek to "fractionalize" or "fractionate" segregation within particular schools. Rather, the Association has sought an opportunity to demonstrate that the racial imbalance in most of Boston's approximately one hundred elementary schools as to which no specific School Committee action was found by the Court was not the result of School Committee action. By prohibiting the Association from offering such evidence, the courts have deprived themselves of any factual basis upon which a remedial decree could be tailored which would have the more modest and practical objective of remedying the "particular denials" of constitutional rights resulting from School Committee action. 20 U.S.C. §1712.

Nor are plaintiffs correct in contending (page 9) that such an approach is inconsistent with this Court's decision in *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973). Indeed, after this Court remanded in *Keyes,* the District Court, though expressing doubt that "these issues are proper for retrial here", 368 F. Supp. 207, 210 (D. Colorado, 1973), admitted evidence very similar to that sought to be introduced by the Association in this case.[5] The Circuit Court disagreed with the District Court's view that such evidence was "somewhat beside the point", 521 F.2d 465 (10th Cir. 1975) at 471, and held that such evidence was not only relevant to the issues raised on remand, but "bore importantly on the issue". *Ibid,* 471-472.

Plaintiffs themselves point out (page 12) that the Equal Educational Opportunities Act of 1974 provides that "the

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[3] The District Court gave, as the "real bottom line" of the Court's rejection of the Association's evidence, its view that the Association's theory was "simply contrary to constitutional law as I understand it". Record Appendix II, 168.

[4] One measurable criterion of the extent of the social disruption caused by the Court's sweeping order is the anticipated cost of police overtime resulting from the necessity to assign a large number of police to patrol the schools ($10,192,045 this year).

[5] "The intended thrust of that evidence has been that segregated conditions in individual schools outside the Park Hill area are wholly the product of external factors such as demographic trends and housing patterns, and are in no way the product of any acts or omissions by defendants." 368 F. Supp. at 210

rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States" (20 U.S.C., §1753), a provision, they say, "whose reenactment (see P.L. 92-318, §805) apparently endorses *Keyes'* recognition of nationwide rules of law for the appraisal of violation claims." Far from supporting the lower courts' rejection of the Association's evidence, however, the quoted language clearly supports the Association's position that evidence respecting the effect of residential segregation on racial imbalance in particular schools should have been received. This was done not only in *Keyes* itself on remand, *supra*, but also in at least two recent cases decided since *Keyes*, namely, *Carr* v. *Montgomery County Board of Education*, 377 F. Supp. 1123 (M.D. Alabama, 1974), *affirmed*, 511 F.2d 1374 (5th Cir. 1975) (where the Court found, after an evidentiary hearing with respect to the proper scope of the remedy, that a number of racially imbalanced schools need not be desegregated because their racial imbalance was shown to have been "a result of residential patterns and not of the school board's action—either past or present", 377 F. Supp. at 1132); and *Northcross* v. *Board of Education of Memphis*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) (where the Circuit Court affirmed a desegregation plan which had left untouched numerous racially imbalanced schools, in part because "minority groups concentrate in urban areas", 489 F.2d at 17.

In both *Carr* and *Northcross*, moreover, the effect of residential patterns on particular schools was considered even though the cases involved southern school systems where *all* of the school desegregation had been originally state-imposed by statute.

VI

With respect to the examination schools, the contention of the plaintiffs' statement (pages 14 and 15) and of the State Board (p. 16) that the issue raised by the District Court's imposition of a quota is now moot, because the modified plan for 1976-1977 does "*not* carry forward the 35% requirement", is, at best, inaccurate. Though the District Court's order of May 3, 1976, for next year did make the 35% quota somewhat less inflexible, in that it will not apply except to black and Hispanic students who score above the 50th percentile in either the Secondary School Achievement Test (SSAT) or a combined SSAT exam and Grade Point Average score, the District Court's Order still requires a racial preference be given up to 35% of the black and Hispanic students who score above the 50th percentile, thus favoring those minorities over better qualified[6] white, oriental and American Indian applicants.

Nor can we understand how the new State regulations referred to at page 15 of the plaintiffs' Brief, which themselves appear unconstitutionally to require that a preference be given on the basis of racial classification, can cure the District Court's imposition of a particular racial balance on the examination schools in contravention of the express injunction of *Swann*.

VII

Finally, plaintiffs (p. 7) and the State Board (p. 6) "mix apples with oranges" when they compare the estimated number of high school children who voluntarily took "buses or public transportation" prior to desegregation,

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[6] In its May 3, 1976, Order, the District Court also conceded, contrary to plaintiffs' contention (page 14), that the SSAT exams had been validated as having "at least some predictive validity". (District Court's Order, page 12).

with the number who are now involuntarily bused, which latter number includes many thousands of elementary school students, almost all of whom had walked to the elementary schools in their immediate neighborhoods prior to the advent of court-ordered busing. Record Appendix II, page 206.

Conclusion

By interpreting the duty to "desegregate" to require the attempted racial balancing of every public school of a large northern city, where evidence has been offered to prove that the racial imbalance found in many of those schools is due to the "myriad factors of human existence", including the very ethnic segregation referred to in *Swann*.[7] rather than to School Committee action, the District Court here and elsewhere has embarked on an endless and ultimately self-defeating attempt to order a remedy which will "embrace all of the problems of racial prejudice, . . . when those problems contribute to disproportionate racial concentrations in some schools". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. at 23. The turmoil, disruption and loss of white students which has occurred in Boston, and which will only continue if further attempts are made to balance schools racially by further racial assignments in future years, cry out to this Court for additional judicial guidance for district courts in the exercise of their difficult duty to eliminate state-imposed segregation. We submit that the remedial guidelines laid down to date have not resulted in remedial decrees which fairly balance the unquestioned right of minority children to be free from the effects of state-imposed segregative acts with the equally important right of innocent citizens

[7] 402 U.S. at 22

of all races to be free from unwarranted federal intervention into their personal lives.

Respectfully submitted,

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